Supreme Court, U.S.
FILED

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NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA
OCTOBER TERM 1994

♦ ♦ ♦ ♦ ♦

ROHN MARTIN ISHMAEL and
DEBRA K. ISHMAEL

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

♦ ♦ ♦ ♦ ♦

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

♦ ♦ ♦ ♦ ♦

DEBRA K. ISHMAEL'S PETITION FOR WRIT OF CERTIORARI

♦ ♦ ♦ ♦ ♦

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♦ ♦ ♦ ♦ ♦

QUESTIONS PRESENTED FOR REVIEW

♦ ♦ ♦ ♦ ♦

1. Is a warrantless FLIR search constitutionally proscribed?

2. Does a business curtilege lose its Fourth Amendment protection because it is located in an "open field" adjacent to a residence?

CERTIFICATE OF INTERESTED PERSONS

♦ ♦ ♦ ♦ ♦

The following is a list of all parties to the judgment which is sought to be reviewed.

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IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

ROHN MARTIN ISHMAEL	§	
AND	§	
DEBRA K. ISHMAEL	§	
Petitioners	§	
	§	
V	§	NO. _____
	§	
THE UNITED STATES	§	
OF AMERICA	§	
Respondent	§	

♦ ♦ ♦ ♦ ♦

DEBRA K. ISHMAEL'S
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

♦ ♦ ♦ ♦ ♦

1. REPORTS OF OPINIONS DELIVERED IN THIS CASE

1.1 United States v Ishmael, 834 F.Supp. 205 (E.D. Tex. 1994). (Appendix, pp. 53-87).

1.2 United States v Ishmael, Opinion of the United States Court of Appeals for the Fifth Circuit, March 15, 1995, United

States v Ishmael, --- F3d 3023 (5th Cir. 1995) (Appendix, pp. 88-121).

2. STATEMENT OF JURISDICTION

2.1 Judgment Sought To Be Reviewed: Judgment of the United States Court of Appeals for the Fifth Circuit, March 15, 1995 (Appendix, pp. 88-121), Suggestion of Rehearing En Banc denied April 19, 1995; Mandate Issued April 27, 1995.

2.2 Statutory Provision Conferring Jurisdiction on the Supreme Court of the United States: The United States Supreme Court has jurisdiction of this matter as provided in 28 USC §1254 (Appendix, p. 5).

3. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

3.1 Jurisdictional Statutes

(A) United States District Court: 18 USC §3231 (See Appendix, p. 2 for text of statute).

(B) United States Courts of Appeal: 18 USC §3731 (See Appendix, pp. 3-4 for text of statute).

(C) United States Supreme Court: 28 USC §1254 (See Appendix, p. 5 for text of statute).

3.2 United States Constitution: Fourth Amendment to the United States Constitution (See 1, p. 1. for text of amendment).

3.3 Offense Statutes: On October 7, 1993, Debra K. Ishmael and Rohn Martin Ishmael were indicted by a United States Grand Jury for violations of:

(A) 21 USC §849 (Conspiracy to Possess with Intent to Distribute More than 100 Marihuana Plants) (See Appendix, pp. 34-35 for text of statute);

(B) 21 USC §841(a)(1) (Possession with Intent to Distribute Over 100 Pants

of Marihuana) (See Appendix, pp. 20-33 for text of statute);

(C) 18 USC §924(c)(1) (Using a Firearm During a Drug Trafficking Crime) (See Appendix, pp. 6-17 for text of statute);

(D) 18 USC §1952(a)(3) (Interstate Transportation in Aid of Racketeering Enterprises) (See Appendix, pp. 18-19 for text of statute); and

(E) Forfeiture under 21 USC §853. (See Appendix, pp. 36-46 for text of statute).

3.4 **Rules of Criminal Procedure**: Rule 41 of the Federal Rules of Criminal Procedure, Search and Seizure (See Appendix, pp. 47-52 for text of rule).

4. STATEMENT OF THE CASE

4.1 **Course of proceedings and disposition in courts below**: On December

2, 1993, the Defendants filed their respective Motions to Suppress Evidence. United States District Judge Robert M. Parker granted the Defendants' Motions to Suppress Evidence. The United States of America Appealed Judge Parker's Order to the United States Court of Appeals for the Fifth Circuit. By opinion dated March 15, 1995, the Court of Appeals held that Judge Parker improperly granted the motions and reversed and remanded to the District Court for further proceedings. Petitioner's Suggestion for Rehearing En Banc was denied April 19, 1995, and the Mandate was issued April 27, 1995.

4.2 Statement of Facts: On September 27, 1993, based on the information secured through records investigation, on-the-ground surveillance, and three searches involving forward

looking imaging devices (FLIR) (two from the air and one on the ground), TFO Paul Black swore out an affidavit which formed the basis of the Henry W. McKee, United States Magistrate Judge's finding of probable cause for a warrant to search Rohn and Debra Ishmael's property near Cushing, Nacogdoches County, Texas. That search warrant, which authorized the seizure of property belonging to the Ishmaels, was executed on September 29, 1993. The resulting search revealed a marijuana growing operation in the basement of the metal building, and Rohn and Debra Ishmael were arrested on that date. On October 6, 1993, a Federal Grand Jury for the Eastern District of Texas indicted Rohn and Debra Ishmael in a six-count indictment charging them with the offenses listed above.

5. JURISDICTION OF THE COURTS BELOW

5.1 Jurisdiction of District Court: The United States District Court has jurisdiction of this matter as provided in 18 USC §3231 (Appendix, p. 2). On October 7, 1993, Debra K. Ishmael and Rohn Martin Ishmael were indicted by a United States Grand Jury for violations of 21 USC §849 (Conspiracy to Possess with Intent to Distribute More than 100 Marihuana Plants) (Appendix, p. 34-35); 21 USC §841(a)(1) (Possession with Intent to Distribute Over 100 Pants of Marihuana) (Appendix, pp. 20-33); 18 USC §924(c)(1) (Using a Firearm During a Drug Trafficking Crime) (Appendix, pp. 6-17); 18 USC §1952(a)(3) (Interstate Transportation in Aid of Racketeering Enterprises) Appendix, pp. 18-19); and Forfeiture under 21 USC §853 (Appendix, pp. 36-46).

5.2 **Jurisdiction of the Fifth Circuit Court of Appeals**: On February 14, 1994, the United States of America filed its formal Notice of Appeal and perfected its appeal to the United States Court of Appeals for the Fifth Circuit, citing in its brief 18 USC §3731 (Appendix, p. 3-4) as jurisdictional grounds for the appeal.

6. REASONS WRIT OF CERTIORARI SHOULD BE GRANTED

Writ of Certiorari should be granted by this court to resolve the following serious constitutional issues:

6.1 Is a warrantless thermal imaging device (FLIR) search constitutionally proscribed?

With each new technological innovation, we move closer and closer to allowing the warrantless use of advance technology to invade the privacy of American homes and businesses. We move closer and closer to allowing the kind of

aerial surveillance using sophisticated electronic equipment about which this Court warned in Dow Chemical Company v United States, 476 US 227 (1986), and we move further and further away from the "naked eye" surveillance approved by the Supreme Court in California v Ciraolo, 475 US 207 (1986).

Recently, there have been several decisions from United States Courts of Appeals, in addition to the Ishmael case, holding that warrantless use of thermal imaging devices (FLIR) does not violate Fourth Amendment protection, (cf United States v Ford, 34 F3d 992 (11th Cir. 1994); United States v Myers, 46 F3d 668 (7th Cir. 1995), and the United States Supreme Court has denied certiorari in United States v Pinson, 24 F3d 1056 (8th

Cir., 1994, cert.den. 115 S.Ct. 664), which address the same issue.

During this same time frame, at least one state court of final resort has made an opposite ruling. (cf Washington v Young, 123 Wash.2d 173, 867 P.2d 593, (1994).

Ford, Myers, Pinson, and Ishmael all emphasize the non-intrusive character of a warrantless thermal imaging device (FLIR) search. These rulings ignore long-standing guidelines such as those provided by the Second Circuit Court of Appeals in United States vs Taborda, 635 F2d 131 (2nd Cir. 1980) regarding the Government agent's use of a sophisticated telescope to view illegal activities. The Court held that unenhanced visual observations made by DEA agents from across the street from defendant's apartment were not

"searches" within Fourth Amendment. However, to the extent that agents used a telescope to identify objects or activities that could not be identified without it, those observations were "searches" and, in absence of a search warrant, the information gathered from such observations could not form the basis for issuance of a search warrant. Like high-powered telescopes, searches using thermal imaging (FLIR) adds one more battalion to the army that marches to assault the precious privacy rights of Americans. FLIR is enhanced surveillance, and certainly does not fit into the category of matters observable with the naked eye.

Further, the Courts in Ford, Myers, Pinson and Ishmael cases, in applying a Katz analysis, found that the owners of

the subject property did not have any subjective expectation of privacy in heat emitting from their home or business, that society is willing to recognize as reasonable.

The use of FLIR allows government agents to draw specific inferences about the inside of a home or business, thus disclosing information about activities occurring within the confines of the home or business. Is not a person entitled to keep such activity from disclosure absent a warrant?

The Supreme Court of Washington in the Washington v Young case recognized

> ...as technology races ahead with ever increasing speed, our subjective expectation of privacy may be unconsciously altered. Our right to privacy may be eroded without our awareness, much less our consent.

That Court went on to say:

> We believe our right to privacy should reflect thoughtful and purposeful choices rather than simply mirror the current state of the commercial technology industry.

This Court is being asked to make that thoughtful and purposeful choice.

What society is willing to recognize as a subjectively reasonable expectation of privacy surely must include a factor of society's awareness of technological advances available to the government that can be used to determine activities in homes and businesses. Is society willing to accept, once aware of the ever-advancing technology, that it is permissible for government agents, without a warrant, to fly over their homes and businesses and use a highly sophisticated and complex instrument that allows photography of things the human eye cannot see?

When the member of this Court are deciding whether or not to grant this petition, it would certainly seem appropriate to be reminded of the strong and wise admonitions given by their predecessors in the two cases that follows:

In McDonald v. United States, 335 U.S. 451, 69 S.Ct. 191, 93 L.Ed. 153 (1948), the Court stated,

> We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows

> that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. (emphasis added).

335 U.S. at 455-56, 69 S.Ct. at 193-94.

Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), is to similar effect:

> Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," United States v. Jeffers, 342 U S 48, 51, 96 L Ed 59, 64, 72 S Ct 93 [95], and that **searches conducted outside the judicial process, without prior approval by judge or magistrate are per se unreasonable under the Fourth Amendment--** subject only to a few specifically established and well-delineated exceptions. (emphasis added)

6.2 Does a business curtilage lose its Fourth Amendment protection because it is located in an "open field" adjacent to a home?

In its opinion in this case, the Court of Appeals held that the warrantless use of a thermal imager (FLIR) to enhance officers' observations of steel building located in an "open field" does not violate the Fourth Amendment (Appendix, p. 101). At the same time, however, the Court of Appeals accepted the District Court's characterization of the steel building as a business curtilage, but took away its Fourth Amendment protection because it was in an "open field" adjacent to a home. (Appendix, p. 115). To say that the government can conduct warrantless searches of a business curtilage simply because it was outside the curtilage of a home eviscerates the Fourth Amendment. The Court of Appeals did say that, and cited United States v Pace, 955 F2d 270 (5th Cir. 1992) and

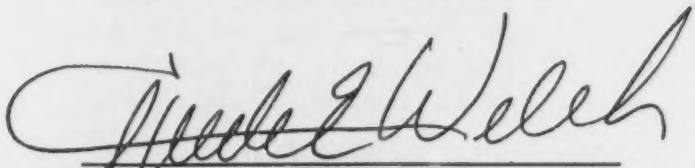
United States v Dunn, 480 US 294, 303-305, 107 S.Ct. 1134, 1140-42, 94 LEd2d 326 (1987), both of which held that "...there is no business curtilage surrounding a barn lying within an open field".

The point should be obvious. The terms "business curtilage" and "open field" are mutually exclusive terms, unlike the non-business curtilage barn discussed in Pace and Dunn.

6.3 **Conclusion**: Petitioner Debra K. Ishmael submits that the state of the law with regard to warrantless searches utilizing thermal imaging devices (FLIR) is not well defined, especially in light of the conflict in the opinion of the Court of Appeals in this case, as discussed in 6.2 above, and Certiorari

should be granted to clarify these important constitutional issues.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petition for Writ of Certiorari of Debra K. Ishmael has been sent to the following named attorneys of record by Certified Mail, Return Receipt Requested, postage prepaid, on June 10, 1995:

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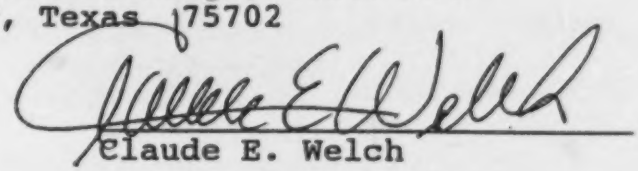

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